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88-2083

NO.

Supreme Court, U.S.
FILED
MAY 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

LINCOLN HOMES, INC., ET AL., PETITIONERS

V.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION
AS RECEIVER FOR FIRST SOUTHERN SAVINGS ASSOCIATION
OF JACKSON COUNTY, MISSISSIPPI

PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

Does the fraudulent misrepresentation by the President of a savings and loan association that property had been appraised for enough to cover the debt entitle debtor to equitable relief against the Federal Savings and Loan Insurance Corporation (FSLIC)?

Would it make any difference if FSLIC had or did not have prior knowledge of the fraudulent misrepresentation?

LIST OF PARTIES

There are no other parties other than those named in the petition.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

NO. _____

LINCOLN HOMES, INC., ET AL. PETITIONERS

V.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION AS RECEIVER FOR FIRST SOUTHERN SAVINGS ASSOCIATION OF JACKSON COUNTY, MISSISSIPPI

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Lincoln Homes, Inc. and Jack E. Koch, through undersigned counsel, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (App. infra, 1a-7a is not reported). The opinion and judgment of the district court (App. infra, 8a-15a) is not reported.

JURISDICTION

The judgment of the Court of Appeals (App.

infra, 7a) was entered on Janurary 19, 1989. A timely petition for rehearing was denied February 16, 1989. (App. infra, 16a). The jurisdiction of this court is invoked under 28 USC 1254 (1).

STATUTES INVOLVED

The Federal Deposit Insurance Act of 1950, §2(13)e 64 Stat 889, as amended, 12 USC §1823(e), 12 USCS §1823(e).

"No agreement which tends to diminish or defeat the right, title or interest of the corporation (FDIC) in any asset acquired by it under this section, either as security for a loan or by purchase, shall be valid against the Corporation unless such agreement (1) shall be in writing, (2) shall have been executed by the bank and the person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the bank, (3) shall have been approved by the Board of Directors of the bank or its loan committee which approval shall be reflected in the minutes of the said board or committee, and (4) shall have been continu-

ously, from the time of its execution, an official record of the bank."

STATEMENT OF THE CASE

Sometime in late 1985, the petitioner, Jack E. Koch, became interested in the apartment complex which is the subject of the litigation in the instant case. During the negotiations, the then President of First Southern Savings Association of Jackson County, Mississippi (First Southern) assured him that there was an appraisal on the property that was sufficient for the debt. The transaction was concluded in December of 1985 and notes were signed by Koch and Lincoln Homes for $535,000. In fact, there was then no appraisal on the property. (An appraisal several months later, before the trial, showed the value of the property as $234,700. Note 1, opinion of the court of appeals, App., infra 4a). The note became delinquent. Koch offered to deed the property back to First Southern to save the expense of litigation. First Southern countered that they had instructed their attorneys to start

foreclosure proceedings. On October 28, 1986, Koch deeded the property back to First Southern. First Southern took no action until February 28, 1987, when suit was filed; not to foreclose, but to set aside the quitclaim deed.

On March 20, 1987, Federal Savings and Loan Insurance Corporation was appointed receiver for First Southern. On April 15, 1987, counsel for FSLIC petitioned for removal of the case to the United States District Court for the Southern District of Mississippi pursuant to 28 USC §1331 and 12 USC §1730 (k)(1) the FSLIC being an agency of the United States within the meaning of 28 USC §551 and 12 USC §1725.

On November 11 , 1987, 8 months after FSLIC had taken over, counsel for FSLIC amended the petition to include foreclosure on the note. The District Court ruled that under D'Oench, Duhme petitioners were barred from raising the fraudulent representations as to an appraisal as a defense. (App., infra 12a).

The Court of Appeals affirmed the judgment

of the District Court, holding also that the fraudulent misrepresentation was not available to petitioners under the D'Oench, Duhme doctrine. (App., infra, 6a).

REASONS FOR GRANTING THE PETITION

This case comes up under the jurisprudence governing operation of the FSLIC and raises serious questions of law that ought to be settled by this court. The instant case involves a factual situation similar to the Langley v. FDIC, ____ US ____, 108 S. Ct. 396, 98 L. Ed. 2d 340 (1987). That case was decided by this court under the provisions of 12 USC ¶1823 (e). There is no statute similar to 1823 (e) governing the operation of FSLIC. However, the Fifth Circuit Court of Appeals in the instant case based its decision on the D'Oench, Duhme doctrine. D'Oench Duhme & co. v. FDIC, 315 US 447, 86 L. Ed. 956, 62 S. Ct. 676 (1942.) If D'Oench, was not sufficient authority for the decision in Langley without invoking the statute, can D'Oench alone be sufficient authority for the court's decision

in the instant case?

It would seem that this court should define the limits of the D'Oench, Duhme doctrine or whether, in fact, the doctrine has any limits.

ARGUMENT

When FSLIC took over First Southern, litigation was already in progress, not to foreclose on the note held by First Southern, but involving the title to the land and to set aside the quitclaim deed that had been delivered to First Southern four (4) months earlier. The false representation made to petitioner as to the appraisal would have entitled petitioner to file suit under Mississippi law to rescind the sale. State Highway commission v. Powell, 185 So. 589 (Miss. 1939). Instead Koch chose to deed the property back. Foreclosure on the note did not become involved until counsel for FSLIC amended the petition some eight (8) months after FSLIC had taken over which raises the question of the FSLIC'S prior knowledge.

The factual situation here is similar to that

in Langley v. FDIC, 98 L. Ed. 2d 340 (1987) in which this court based its decision on 12 USC §1823(e). Prior to Langley some federal courts had held that the FDIC was a holder in due course. Gunter v. Hutcheson, 674 F 2d 862 (1982). Here the court said:

"Accordingly, we hold that as a matter of federal common law, the FDIC has a complete defense to state and common law fraud claims on a note acquired by the FDIC in execution of a purchase and assumption transaction for value, in good faith, and without actual knowledge of the fraud at the time the FDIC entered into the purchase and assumption agreement. We note, moreover, that the rule we adopt today is in accord with similar decisions by other federal courts." (citing decisions). Gunter, supra p. 873.

In applying §1823(e) in Langley, the court said:

"The short of the matter is that Congress opted for the certainty of the requirements set

forth in 1823(e). An agreement that meets them prevails even if the FDIC did not know of it; and an agreement that does not meet them fails even if the FDIC knew. It would be rewriting the statute to hold otherwise." Langley, supra, p. 349.

There is no statutory provision similar to §1823(e) that applies to FSLIC.

In Federal Savings & Loan Insurance Corporation v. HSI, 657 F Supp. 1333 (Ed. LA. 1986) the court said:

"...§1823(e) is not binding here even though the common law doctrine of D'Oench is. By its own terms the statute applies only to the FDIC, but the cases decided under the statute are persuasive authority in this case, because they indicate the likely direction of the D'Oench doctrine in the Fifth Circuit." FSLIC v. HSI, supra at p. 1338.

In FSLIC v. Lafayette Investment Properties, Inc. 855 F 2d 196, the Fifth Circuit barred mis-

representation under what the court referred to as "the D'Oench, Duhme doctrine as further defined by Langley." (cit. supra, p. 198). The court further said:

"Watkins also asserts that the FSLIC is not a holder in due course. We hold that the D'Oench, Duhme doctrine is applicable and therefore the FSLIC status as a holder in due course is immaterial." (cit. supra, N 2 p. 198).

In FSLIC v. Murray, 853 F 2d 1251 the court held that factual misrepresentations failed as a defense under the Supreme Court analysis in Langley. (cit. supra, p. 1255). In the Murray case the court also said:

"... the sensitive federal interests implicated when FSLIC rescues an insolvent savings and loan lead us to conclude that FSLIC should enjoy at least holder in due course status as a matter of federal common law." Murray, supra, p. 1256

It seems illogical to hold in one case that

the FSLIC should have the status of a holder in due course and to hold in another case that it is immaterial whether the FSLIC is a holder in due course or not. Similar confusion in FDIC jurisprudence prompted the court to decide the Langley case. The emerging confusion in the jurisprudence relating to FSLIC can only be avoided by a decision of this court that will do for FSLIC what Langley did for FDIC jurisprudence.

CONCLUSION

We respectfully submit that the petition should be granted.

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CERTIFICATE OF SERVICE

I certify that seven (7) copies of the above amended petition for writ of certiori with appendix has been mailed, United States postage pre-paid this 21st day of June, 1989 to counsel of record for FSLIC.

I further certify that three (3) copies of the above petition for writ of certiori with appendix has been air mailed, United States postage pre-paid, this 21st day of June, 1989, to the Solicitory General, Department of Justice, Washington, D.C. 20530, since the FSLIC, an agency of the United States is a party.

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 88-4331
SUMMARY CALENDAR

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION
AS RECEIVER FOR FIRST SOUTHERN SAVINGS
ASSOCIATION OF JACKSON COUNTY, MISSISSIPPI
Plaintiff-Appellee

versus

LINCOLN HOMES, INC., ETC. AND JACK E. KOCH
Defendants-Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
(CA-87-0230-G)

(January 19, 1989)

Before CLARK, Chief Judge, JOHNSON AND JOLLY, Circuit Judges.

PER CURIAM: *
Defendant Jack E. Koch appeals the district

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*Local Rule 47.5 provides: "The publication of opinions that have no precidential value and merely decide particular cases on the basis of well settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

court's order setting aside a quitclaim deed tendered by Koch in satisfaction of his indebtedness to First Southern Savings Association of Jackson County, Mississippi. Concluding that the district court did not err in setting aside the quitclaim deed, we affirm.

FACTS AND PROCEDURAL HISTORY

Jack E. Koch (Koch), through his company, Lincoln Homes, Inc. purchased an unfinished apartment complex in Jackson County, Mississippi (the "property"). As consideration for the purchase, Koch assumed the outstanding indebtedness which was secured by the property and owed to First Southern Savings Association of Jackson County, Mississippi (First Southern). Additionally, First Southern loaned Koch $100,000 to complete construction on the apartments. A note in the amount of $535,000 and a deed of trust to the property in favor of First Southern were executed by Koch.

Some time thereafter, Koch failed to make the

required monthly payments on the note. To satisfy his obligation to the underlying debt, Koch offered to deed the property to First Southern in lieu of foreclosure, however, First Southern rejected the offer. Nevertheless, Koch prepared and sent First Southern a quitclaim deed to the property after recording the deed in the county land records.

Subsequently, First Southern initated foreclosure proceedings. Approximately four months after receiving the quitclaim deed tendered by Koch, First Southern filed suit in the Chancery Court of Jackson County, Mississippi to set the deed aside.

In the meantime, the Federal Savings and Loan Insurance Corporation (FSLIC) was appointed as receiver for First Southern. The FSLIC removed the case from the stated chancery court to the US District Court for the Southern District of Mississippi. The District Court set aside the quitclaim deed, appointed a special master to

conduct a foreclosure sale of the property, and ordered a judgment against Koch for any deficiency which remained after the sale. From the district court's order Koch filed this timely appeal.

II. DISCUSSION

On appeal, Koch advances the same two arguments which he raised in the district court. First, Koch contends the First Southern's silent possession of the quitclaim deed for four months constituted acceptance of the deed. Second, he argues that during negotiations, First Southern's President, Kent Kigdon (Higdon) represented to Koch that there had been an appraisal on the property when there, in fact, had been no such appraisal.[1] In that regard, Koch urges that Higdon's misrepresentation should operate as an equitable defense to Koch's obligation on the note.

With respect to Koch's first argument, it is hornbook law that a deed purporting to convey

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1. Prior to trial, an appraisal of the apartment property indicated a value of $284,700 whereas the amount owed by Koch on the note was $669,793.70

interest in real property is ineffective absent acceptance thereof by the grantee. Whether a deed has been accepted by a grantee is to be determined on the basis of the conduct of parties and the circumstances surrounding the transaction. Odom v. Forbes 500 So. 2d 997 1001 (Miss. 1987). The District court found that First Southern never gave Koch any indication that it intended to accept the quitclaim deed. Nevertheless, Koch prepared the deed, recorded it, and mailed it to First Southern in an admitted attempt to satisfy his indebtedness to First Southern. First Southern, in response, filed suit to set aside the deed. On these facts, we are unable to conclude that the district court's finding that First Southern did not accept the quitclaim deed was clearly erroneous. Fed. R. Civ. P. 52(a).

We are likewise unpersuaded by Koch's second argument that Higdon's alleged misrepresentation concerning the appraisal should be available to

Koch as defense to the repayment of his indebtedness. Koch testified at trial that there never was an agreement between him and First Southern's officers to make repayment of the note contingent upon an appraisal of the property. Even assuming for sake of argument that Higdon's alleged oral misrepresentation with respect to the property appraisal induced Koch to execute the promissory note to First Southern, the misrepresentation is unavailable to Koch as a defense under the D'Oench, Duhme doctrine.[2] As the district court correctly noted, the D'Oench, Duhme doctrine operates to preclude debtors of federally insured financial institutions such as First Southern from raising defenses based on oral agreements with officers of those institutions that subsequently fail. Therefore, we conclude that any misrepresentation allegedly made by Higdon regarding the appraisal of the property at issue in this case is unavail-

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2. D'Oench, Duhme & co. v. FDIC, 315 US 447 (1942).

able to Koch as a defense to the repayment of his indebtedness.

III. CONCLUSION

Perceiving no error in the district court's conclusion, First Southern did not accept the quitclaim deed tendered by Koch and that Koch's misrepresentation defense is without merit, we affirm the judgment of the district court setting aside the quitclaim deed and ordering a foreclosure sale and deficiency judgment in favor of the FSLIC.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, AS RECEIVER FOR FIRST SOUTHERN SAVINGS ASSOCIATION OF JACKSON COUNTY

PLAINTIFF

V.

LINCOLN HOMES, INC. AND JACK E. KOCH

DEFENDANTS

BENCH OPINION BEFORE HON. WALTER J. GEX III
APRIL 14, 1988

This cause comes before the Court for trial without a jury, and the Court, having fully heard the evidence presented by both parties, makes the following findings of fact and conclusions of law pursuant to Rule 52.

The Plaintiff seeks to set aside a quitclaim deed executed by the defendants, Lincoln Homes and Jack E. Koch, purportedly conveying the property to First Southern Savings Association of Jackson County, Mississippi, hereinafter referred

to as First Southern in lieu of foreclosure.

On December 16, 1985, the defendants, for a valuable consideration, jointly executed a promissory note in favor of First Southern in the principal amount of five hundred and thirty five thousand dollars providing for interest at nine percent per annum.

On March 4, 1986, Defendants executed a corrected deed of trust to secure the payment of the above-referred to promissory note. The deed of trust conveyed to the trustee, with power of sale the following described real property located in Jackson County, Mississippi:

The North ½ of Lot 4, all of lots 5,6,7, and 8, on Rivers Edge Subdivision, as per plat thereof recorded in Plat book 15, page 39, in the fice of the Chancery Clerk of Jackson County, Mississippi.

The Defendants defaulted on the payment of the subject promissory note in the summer of 1986. On October 15, 1986, the Defendant, Koch,

fowarded a letter to First Southern suggesting that he deed the land to First Southern in lieu of foreclosure. First Southern did not agree to the Defendant's offer.

On October 28, 1986, First Southern received a copy of a quitclaim deed executed by the defendants. First Southern never accepted the purported conveyance of the property. Instead, First Southern instigated this suit to set aside the deed.

Through the period in question the defendants retained control of the property, managed the property through its own management company, made its own repairs, and kept profit and loss records. The Defendants never fowarded any of the profits to First Southern for application to the indebtedness.

The defendant, Koch, asserts that Kent Higdon, president of First Southern at the time of the inital negotiations for the purchase of the property and execution of the promissory note occur-

red, misrepresented to him the existence of an appraisal of the property. Defendant Koch contends that Higdon led him to believe the property would be of enough value to support the debt. However, Koch admitted that the obligation to repay the note was not contingent upon the appraisal of the property. The alleged misrepresentation did not make repayment conditional. It was never part of the contract nor was it ever committed to in writing.

On March 20, 1989, the Federal Saving and Loan Insurance Corporation, hereinafter referred to as FSLIC, took over as receiver for First Southern.

The attempted conveyance of the property to First Southern is nothing more than a unilateral offer to contract. Since the plaintiff never accepted such offer, the attempted conveyance is not valid. The misrepresentation, if any, by Higdon is not acceptable as a defense to this action.

The doctrine of D'Oench, Duhme & Company, Inc., v Federal Deposit Insurance Corporation, 315 US 447 (1942) is a rule of estoppel designed to prevent those who give notes to federally insured institutions from raising defenses based on alleged oral agreements that they had with the officers of failed institutions with regards to the enforceability of promissory notes. Further D'Oench estops the debtor from asserting any defense arising out of a fraudulent scheme, inclusive of representations made by another participant in the scheme. Federal Savings and Loan Insurance Corporation v. Lefeve, 646 F. Supp. 764, 769, (Southern District of Mississippi 1987) case. Therefore, the defense raised by the defendant is barred.

Therefore, the Plaintiff is entitled to have the quitclaim deed set aside.

All right, you can submit an order based upon that.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, AS RECEIVER FOR FIRST SOUTHERN SAVINGS ASSOCIATION OF JACKSON COUNTY

PLAINTIFF

VERSUS

LINCOLN HOMES, INC. AND JACK E. KOCH

DEFENDANTS

FINAL JUDGMENT

THIS CAUSE came on for trial before the court, without a jury, on April 14, 1988, and the court, having previously issued its findings of fact and conclusions of law and having entered its order setting aside the quitclaim deed dated October 28, 1986, and appointing Special Master to conduct foreclosure of the corrected Deed of Trust dated March 4, 1986, which order was entered on April 25, 1988, and having now received the report of said Special Master of his having conducted the foreclosure sale as directed by the

court, and having entered an order confirming such sale, now finds that this matter is ripe for the entry of final judgment for the plaintiff for the deficiency balance which remains outstanding on the subject indebtedness.

IT IS THEREFORE ORDERED AND ADJUDGED that the plaintiff, Federal Savings and Loan Insurance Corporation, as Receiver for First Southern Savings Association of Jackson County (FSLIC), recover from the defendants, Lincoln Homes, Inc. and Jack E. Koch,the outstanding principal and interest balance on the subject promissory note as of the date of the trial of this cause, Six Hundred Sixty Nine Thousand Seven Hundred Ninety Three and 70/100ths Dollars ($669,793.70), plus interest at the rate of $133.40 per diem from the date of trial, April 14, 1988, until the date of entry of this judgment, in the amount of Forty Two Thousand Eight Hundred Twenty One and 40/100ths Dollars ($42,821.40) (321 days at $133.40 per diem), plus attorney's fees and

expenses proven at trial in the amount of $6671.25, less the net proceeds of the foreclosure sale of $261,586.45, for a total net judgment of $457,699.90, plus interest thereupon at the rate of 8% per annum from the date hereof, and all costs of this action.

SO ORDERED AND ADJUGED, this the 1st day of March, 1989.

(Sgd.)

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 88-4331

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, as receiver for FIRST SOUTHERN SAVINGS ASSOCIATION OF JACKSON COUNTY,

Plaintiff-Appellee,

versus

LINCOLN HOMES, INC., ETC. AND JACK E. KOCH,

Defendants-Appellants

Appeal from the United States District Court for the Southern District of Mississippi

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ON PETITION FOR REHEARING

(FEBRUARY 16, 1989)

Before Clark, Chief Judge, JOHNSON and JOLLY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:
SGD
U. S. CIRCUIT JUDGE

Supreme Court, U.S.
FILED
AUG 28 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-2083

In the Supreme Court of the United States

OCTOBER TERM, 1989

LINCOLN HOMES, INC., AND JACK E. KOCH, PETITIONERS

v.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, AS RECEIVER FOR FIRST SOUTHERN SAVINGS ASSOCIATION OF JACKSON COUNTY, MISSISSIPPI

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners, who borrowed money from a savings and loan association that was subsequently placed in a Federal Savings and Loan Insurance Corporation (FSLIC) receivership, are precluded in a suit by FSLIC from defending against repayment of the loan on the basis of an alleged oral misrepresentation by an officer of the thrift.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-2083

LINCOLN HOMES, INC., AND JACK E. KOCH, PETITIONERS

v.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, AS RECEIVER FOR FIRST SOUTHERN SAVINGS ASSOCIATION OF JACKSON COUNTY, MISSISSIPPI

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is unpublished, but the decision is noted at 866 F.2d 1418 (Table). The opinion of the district court (Pet. App. 8a-12a) is unreported.

JURISDICTION

The court of appeals entered judgment on January 19, 1989. A petition for rehearing was denied on February 16, 1989. Pet. App. 16a. The petition for a writ of certiorari was filed on May 17, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners, who borrowed money from a savings and loan association that was subsequently placed in receivership, challenge the court of appeals' ruling that their claim of misrepresentation by the thrift was not valid against the receiver as a defense to repayment of the loan.

1. In 1985, petitioner Koch became interested in acquiring an uncompleted apartment complex located in Jackson County, Mississippi. The complex was encumbered by a deed of trust held by First Southern Savings Association of Jackson County, Mississippi. In December 1985, Koch and his company, petitioner Lincoln Homes, Inc., purchased the property. They assumed the outstanding indebtedness to First Southern and borrowed an additional $100,000 from First Southern for completion of construction. Petitioners gave First Southern an installment note for $535,000, secured by a deed of trust on the property. See Pet. 3; Pet. App. 2a.

Nothing in the note or in any other written document made repayment of the borrowed sum contingent on any appraisal of the property. Petitioners subsequently alleged, however, that First Southern's president orally indicated at the time of the loan transaction that the property had an appraised value sufficient to cover the debt. But petitioner Koch admitted at trial that there was not in fact any agreement that made the obligation to pay the note contingent on any appraisal of the property. Pet. App. 6a, 11a.

In the summer of 1986, petitioners defaulted on their payments on the note. They subsequently offered to deed the property to First Southern in lieu of the thrift's pursuing its foreclosure remedy. First Southern rejected the offer. Petitioners nevertheless issued, recorded, and mailed to the thrift a quitclaim deed to the property. Pet. App. 3a.

2. In February 1987, First Southern filed a complaint in the Chancery Court of Jackson County, Mississippi, asking the court to set aside the quitclaim deed issued by petitioners. The following month, the Federal Savings and Loan Insurance Corporation (FSLIC) was appointed receiver for First Southern. See Pet. 4.[1] FSLIC removed the case to the United States District Court for the Southern District of Mississippi, and it amended the complaint to seek the additional relief of foreclosure of the deed of trust and entry of a judgment against petitioners for any deficiency remaining after the sale of the property. See *ibid.*; Pet. App. 3a-4a.

Following trial, the district court set aside the quitclaim deed, appointed a special master to conduct a foreclosure sale of the property, and ordered that a deficiency judgment be entered for the balance of the indebtedness after the sale was completed. Pet. App. 8a-12a. The court held, contrary to petitioners' argument, that their attempted conveyance of the property by tendering the quitclaim deed was invalid because the offer was not accepted. *Id.* at 11a. The court also ruled that petitioners' claim of misrepresentation, based on the thrift president's statements regarding appraisal of the property, was not valid against FSLIC as a defense to repayment of the note. Without deciding whether any misrepresentation ever occurred (see *ibid.*), the court held that petitioners' defense was barred by the federal common law doctrine of *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942). Pet. App. 12a.[2]

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[1] Until August 9, 1989, FSLIC was the receiver for the thrift. On that date, the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, took effect. H.R. Conf. Rep. No. 222, 101st Cong., 1st Sess. (1989). Section 401(a)(1) of the Act abolishes FSLIC on the effective date of the Act. Section 401(f)(2) declares that suits by or against FSLIC shall not abate.

[2] A final judgment, which includes a deficiency assessment of more than $457,000, was entered against petitioners on March 1, 1989. Pet. App. 13a-15a.

3. The court of appeals, in an unpublished opinion, affirmed. Pet. App. 1a-7a. After rejecting petitioners' argument that the thrift had actually accepted the quitclaim deed (*id.* at 4a-5a), an argument that is not renewed in this Court, the court of appeals held that petitioners did not have a valid defense to repayment of the loan based on the alleged misrepresentation concerning the appraised value of the property. The court gave two reasons. First, as petitioner Koch himself testified at trial, repayment of the loan was never made contingent on any appraisal of the property. *Id.* at 6a. Second, even if the alleged misrepresentation constituted fraud in the inducement, the *D'Oench, Duhme* doctrine precludes petitioners from relying on it against FSLIC as a defense to repayment of the loan. That doctrine, the court explained, "operates to preclude debtors of federally insured financial institutions such as First Southern from raising defenses based on oral agreements with officers of those institutions that subsequently fail." *Ibid.*

ARGUMENT

Petitioners' challenge to the court of appeals' ruling that *D'Oench, Duhme* bars their misrepresentation defense is without merit and does not warrant this Court's review.

1. The court of appeals correctly applied the *D'Oench, Duhme* doctrine to petitioners' misrepresentation defense.[3] The courts have uniformly held that doctrine applicable to FSLIC even though, as petitioners note (Pet. 5), the doctrine has never been reflected in a statute applicable to FSLIC, whereas the doctrine does have a

[3] Neither of the courts below concluded that any misrepresentation ever actually occurred. And both courts noted that petitioners admitted that there was no agreement to make repayment contingent on appraisal of the property. Pet. App. 6a, 11a.

statutory counterpart—enacted after *D'Oench, Duhme* was decided—applicable to the FDIC, 12 U.S.C. 1823(e). See, *e.g., Mainland Sav. Ass'n* v. *Riverfront Assocs., Ltd.*, 872 F.2d 955, 956 (10th Cir. 1989), petition for cert. pending, No. 89-95; *Firstsouth, F.A.* v. *Aqua Const., Inc.*, 858 F.2d 441, 442-443 (8th Cir. 1988); *FSLIC* v. *Lafayette Inv. Prop., Inc.*, 855 F.2d 196, 198 (5th Cir. 1988); *Taylor Trust* v. *Security Trust Fed. S&L*, 844 F.2d 337, 342 (6th Cir. 1988)). And the *D'Oench, Duhme* doctrine's aims of protecting federal insurers, regulators, and receivers of financial institutions, and thereby indirectly promoting the integrity of the institutions and protecting their depositors and creditors, applies as strongly to thrifts, with FSLIC as insurer, regulator, and receiver, as to banks, with the FDIC in those roles.

Petitioners' defense comes within the scope of the doctrine. Their defense rests on the claim that they incurred their debt as a result of First Southern's fraudulent assurances that the property had a specified value. As this Court explained in *Langley* v. *FDIC*, 108 S. Ct. 396, 402 (1987), *D'Oench, Duhme* bars a borrower's assertion of a defense based on an arrangement with a financial institution that would "tend to deceive" or be "likely to mislead" the regulatory authorities, and "one who signs a facially unqualified note subject to an unwritten and unrecorded condition upon its repayment has lent himself to" just such an arrangement, "whether the condition consists of performance of a counterpromise (as in *D'Oench, Duhme*) or of the truthfulness of a warranted fact." Moreover, because it is mere tendency or likelihood to deceive regulatory authorities that triggers application of the doctrine, *D'Oench, Duhme* applies even though FSLIC may have known of the defense when it became receiver of First Southern.[4]

[4] None of the decisions cited by petitioners (Pet. 7-9) declined to ap-

2. The question of *D'Oench, Duhme*'s scope as applied to FSLIC is of little if any continuing importance. Under Section 401(a)(1) of the recently enacted Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73 (Aug. 9, 1989), FSLIC was abolished on August 9, 1989. See H.R. Conf. Rep. No. 222, 101st Cong., 1st Sess. 182 (1989). Moreover, all newly created federal-agency receiverships of federally insured depository institutions, as well as certain recently created receiverships, are covered by the newly amended version of 12 U.S.C. 1823(e).[5] Under *Langley*, that provision plainly bars the type of defense petitioners have raised, making reference to *D'Oench, Duhme* unnecessary. And for pre-Act receiverships like the one in the present case, even aside from the possible applicability of 12 U.S.C. 1823(e) to the successor receiver, the court of appeals' application

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ply *D'Oench, Duhme* because the receiver knew of the defense when it assumed that role.

Gunter v. *Hutcheson*, 674 F.2d 862, 873 (11th Cir.), cert. denied, 459 U.S. 826 (1982), did mention such knowledge in discussing the *D'Oench, Duhme* doctrine, but it merely noted the absence of such knowledge in holding that the doctrine did apply to the FDIC (in its corporate capacity) on the facts before it. In any event, *Langley*, decided after *Gunter*, both demonstrates that the result in *Gunter* should have been based on 12 U.S.C. 1823(e) (so that the Eleventh Circuit's reliance on *D'Oench, Duhme* was not necessary) and also makes clear that actual knowledge is not relevant to the statutory or common law protections.

[5] Section 217 of the new Act amends 12 U.S.C. 1823(e) to make it expressly applicable to notes acquired by the FDIC as receiver. That provision is also applicable to the Resolution Trust Corporation, which, among other duties, serves as successor receiver in cases where FSLIC was appointed receiver on or after January 1, 1989. § 501(a) (to be codified at 12 U.S.C. 1441a(b)(4)). Newly created federal receiverships have either the FDIC or the Resolution Trust Corporation as receiver. § 501(a) (to be codified at 12 U.S.C. 1441a(b)(4) and (6)); § 212(a) (to be codified at 12 U.S.C. 1821(c)).

of the *D'Oench, Duhme* doctrine to bar petitioners' defense is reinforced by the new Act's extension of Section 1823(e), which reaffirms the federal policies underlying the doctrine.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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